

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION**

CIVIL ACTION NO. 5:11-CV-00139-RLV-DCK

MARX INDUSTRIES, INC.,

Plaintiff,

v.

CHESTNUT RIDGE FOAM, INC.

Defendant.

v.

MTJ AMERICAN, LLC

Third-Party Defendant.

**THIRD PARTY DEFENDANT'S
MOTION TO AMEND THE
PLEADINGS**

NOW COMES Third Party Defendant MTJ American, LLC ("MTJ") moving the Court pursuant to Rule 15 of the Federal Rules of Civil Procedure, as well as Rule 7.1 of the local rules of the Court, for leave to permit MTJ to amend MTJ's "Third Party Defendants Motion to Dismiss, Answer to Counterclaims And Affirmative Defenses" to add counterclaims herein asserted and attached at **Exhibit 1** hereto. In addition to the grounds set forth in the accompanying "Third Party Defendant's Memorandum in Support of Third Party Defendant's Motion to Amend Pursuant to F.R.C.P 15", MTJ states as follows:

1. Plaintiffs Marx Industries, Inc. filed Complaint in Caldwell County, North Carolina on August 31, 2011 seeking declaratory relief.
2. Defendant Chestnut Ridge Foam, Inc. ("CR") removed the action to federal court on September 30, 2011.

3. Third Party Defendant MTJ American, LLC ("MTJ") manufactures mattresses for institutional settings, including without limitation correctional institutions.
4. Mark Kiser is an owner of both MTJ as well as and Plaintiff Marx. Marx is a foam supplier to MTJ.
5. The Deadline to Move to Amend Pleadings has not expired. The deadline for Motions is October 15, 2013, and the Dispositive Motions Deadline is currently October 22, 2013. The Case Management Order set trial for the first to commence during the March 2014 trial setting.
6. Defendant Chestnut Ridge filed "Answer, Affirmative Defenses And Counterclaims to Complaint" on October 26, 2012 [ECF Doc. 22], asserting Third Party Claims against MTJ. Plaintiff and MTJ filed Motion to Dismiss, Answer to Counterclaims and Affirmative Defenses on January 15, 2013. [ECF Doc. 29].
7. Defendant and Third Party Plaintiff Chestnut Ridge ("CR") provided responses to discovery, which information was solely in CR's possession, and which was received on September 16, 2013. CR's discovery responses show that CR (1) pursued a patent by filing application in 2005 which application did not disclose prior art; (2) pursued patent application that did not include all necessary inventors; (3) CR knew the patent was an invalid patent *ab initio* due to other substantially similar products existing in the marketplace for more than a year prior to the patent application; and (4) CR has used said invalid patent for harming MTJ's sales, to hinder threat seeking licensing arrangements from non-infringing parties, and generally for the bad faith purpose of unfairly competing and deceptively restraining trade.

8. In early September 2013, Marx and MTJ learned that CR made disparaging comments regarding MTJ to UNICOR and sought to stop manufacture of non-infringing products by UNICOR. CR's statements were confirmed via emails received from CR on September 16, 2013.
9. Under the circumstances, MTJ has reasonable concern that CR has made similar overtures similar to those made to UNICOR to other customers relating to the patent and defamed Marx and MTJ to potential and actual customers.
10. Third Party Defendant MTJ's Answer needs to be supplemented and amended in accordance with Rule 15 of the Federal Rules of Civil Procedure to add facts and claims for relief which were not known and other facts which were neither clearly known at the time of filing the Answer and not understood at the time of filing the Answer, or which acts and omissions occurred after the filing of the Complaint and Third Party claims during the pendency of the action which establish valid claims for relief for MTJ. The additional claims for relief and factual averments sought to be supplemented and amended relate primarily to CR's acts and omissions arising after October 1, 2012 including and through January 18, 2013.
11. Justice requires that Third Party Defendant MTJ be granted leave to supplement and amend Third Party Defendants Answer and Affirmative Defenses with Counterclaims that comport with new facts discovered in September 2013.
12. Attached hereto as **Exhibit 1** is the proposed First Amendment to supplement with Counterclaims MTJ's Answer and Affirmative Defenses, that MTJ intends, which proposed First Amended includes the addition of factual averments and three specific express claims for relief.

13. Pursuant to Local Rule 7.1, Plaintiffs contacted Defendant's counsel via phone, email and facsimile on October 14, 2013 requesting consent to amend MTJ's Answer to include counterclaims. Defendant refused to consent to amendment or supplementation.

WHEREFORE, Third Party Defendant MTJ respectfully moves the Court pursuant to Rule 15 of the Federal Rules of Civil Procedure for an Order permitting MTJ to Amend MTJ's Answer and Affirmative Defenses to include the factual allegations and counterclaims attached at **Exhibit 1**.

This the 15th day of October, 2013.

/s/ Matthew K. Rogers
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CERTIFICATE OF SERVICE

I hereby certify that on this date, October 15, 2013, I electronically filed the foregoing **Third Party Defendant's Motion to Amend The Pleadings** for the above captioned matter with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

pbarry@cohenlaw.com
clayendecker@cohenlaw.com
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This the 15th day of October, 2013.

Law Offices of Matthew K. Rogers, PLLC

By: /s/Matthew K. Rogers
Matthew K. Rogers
Attorney for Plaintiff and Third Party Defendant

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